Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT
OF
THE UNITED STATES

October Term, 1997

ALBERT G. WURZBERGER, Petitioner

v.

STATE OF VERMONT, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a defendant denied constitutional due process when, after a trial court has held that prosecuting him for possession of fireworks unconstitutional because the statute's definition of fireworks is void for vagueness, after the State's supreme court has refused to allow a discretionary appeal of the ruling, and after the trial court has dismissed the prosecution with prejudice on constitutional grounds without opposition from the State, the court then refuses to apply issue preclusion in a later prosecution under the same statute using the same evidence on which the court dismissed the earlier prosecution?

2. Under the above circumstances, is the defendant denied constitutional due process when the court refuses to apply claim preclusion to bar the later prosecution?

3. Is the defendant denied constitutional due process when an appellate court holds that an appeal of a final criminal judgment does not include an appeal of the exclusion of evidence first excluded in limine and thus refuses to address the exclusion of evidence showing the defendant reasonably relied on the court's own prior holding that the statute was unconstitutional?

LIST OF PARTIES

The parties below were petitioner Albert G. Wurzberger and the respondent State of Vermont.

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I. By holding it would be unfair to the State of Vermont to preclude the State from relitigating whether the statute under which the State sought to prosecute Mr. Wurzberger was void for vagueness after the Vermont Supreme Court exercised its statutory right to refuse to let the prosecution appeal the void for vagueness decision, and after the first prosecution was dismissed with prejudice and without opposition from the State, the Vermont Supreme Court denied Mr. Wurzberger due process of law, contrary to decisions of this Court and others 9

II. By holding that, because the offense dates are different, claim preclusion does not apply to otherwise identical criminal prosecutions resting on the same evidence, the Vermont Supreme Court denied Mr. Wurzberger due process of law 13

III. By holding that Mr. Wurzberger had to appeal separately a ruling in limine excluding evidence of his reasonable reliance on the trial court's first holding of unconstitutionality, although the exclusion was repeated at trial over his objection, and by thus refusing to address the exclusion because he did not specifically appeal the ruling in limine, the Vermont Supreme Court denied Mr. Wurzberger due process of law 15

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1997

ALBERT G. WURZBERGER, *Petitioner*

v.

STATE OF VERMONT, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

The petitioner, Albert G. Wurzberger, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Vermont, entered in the above-entitled proceeding on 8 August 1997.

OPINIONS BELOW

The opinion of the Vermont Supreme Court is reported at ___ A.2d ___, 1997 WL 448449, and is reprinted in the appendix p. 1a.

The Vermont District Court decided this case by jury verdict unaccompanied by opinion. Its earlier opinion denying the petitioner's motion to dismiss

prosecution was not reported. It is reprinted in the appendix p. 21a. The transcript of its oral opinion granting the State's second motion in limine is printed in the appendix, p. 27a.

JURISDICTION

The Vermont Supreme Court's decision affirming petitioner's conviction was entered on 8 August 1997. The Vermont Supreme Court denied petitioner's motion for reargument on 10 September 1997.

This Court's authority to review on a writ of certiorari rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment XIV § 1: "nor shall any State deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

In 1987, police seized various items from the petitioner, Albert G. Wurzberger, claiming they were fireworks prohibited under Vt. Stat. Ann. tit. 20 §§ 3131-32 (hereafter "the fireworks statute"). None of them differed in nature or size from those seized in the present case. Mr. Wurzberger petitioned that the Vermont District Court order his property returned. The Vermont court held § 3131 unconstitutional as applied because it was so vague that it neither gave fair

warning of what it forbade nor gave sufficiently precise standards to avoid arbitrary and discriminatory enforcement. Once the District Court held the statute unconstitutional, the State did not charge Mr. Wurzberger in 1987.

In 1992, police again seized from Mr. Wurzberger what they said were fireworks forbidden by the fireworks statute. None differed in nature or size from those seized in 1987 or in the present case. Again, Mr. Wurzberger petitioned for return of his property. The State then filed criminal charges against Mr. Wurzberger. Elaborating on its 1987 order, the Vermont court again found the statute void for vagueness as applied and ordered the fireworks returned. The State sought permission to appeal the order to return property. The Vermont court denied permission for the interlocutory appeal. The State then asked permission from the Vermont Supreme Court. The State argued "[i]f the appeal is not allowed, the question as to whether the statute in question is unconstitutional remains open and bothersome," yet the State "would be left without avenues to pursue this issue." The Vermont Supreme Court denied the State permission to appeal in 1992. Mr. Wurzberger moved to dismiss the entire prosecution; the State filed no opposition. The Vermont court dismissed the action with prejudice, on the constitutional grounds it had noted earlier.

In 1994, Mr. Wurzberger was again charged with violating the fireworks statute. None of the evidence differed in nature or size from that seized in 1987 or 1992. As in 1992, Mr. Wurzberger moved to dismiss on the grounds that the statute was unconstitutionally vague and that the prosecution was barred by the 1987 and 1992 decisions. Mr.

Wurzberger's arguments regarding claim preclusion and issue preclusion were explicitly grounded on the fact that, in 1987 and 1992, Mr. Wurzberger had been charged with the identical offense regarding identical items.

Mr. Wurzberger's res judicata defenses (issue and claim preclusion) explicitly and implicitly rested on federal due process grounds. In his 14 March 1995 Supplemental Support for Defendant's Motion to Dismiss for Lack of Prima Facie Case, he bolstered his res judicata arguments by citing Board of Electric Light Commissioners of the City of Burlington v. McCarren, 725 F.2d 176 (2d Cir. 1983) and United States v. Stauffer Chemical Co., 464 U.S. 165 (1984). The former rested on this Court's res judicata holding in Parklane Hosiery Co. v. Shore, 439 U.S. 322,326-33 (1979). In that case id. at 327 n.6, this Court recognized "general elementary law" shaped the principles of issue preclusion, thus implying that due process requires that a res judicata not be relitigated. In his memorandum to the trial court, Mr. Wurzberger also incorporated an 18 February 1995 memorandum in a companion case, State v. Dann, in which the fireworks defendant wrote at 3 that "the State's Attorney's argument would lead to a ridiculously unfair situation that would surely violate due process."

The State said claim and issue preclusion did not apply because, when the State was denied its 1992 interlocutory appeal, it could not litigate the 1992 issues "fully and fairly." In his 14 March 1995 Supplemental Support for Motion to Dismiss, Mr. Wurzberger included by reference the following from his 14 March 1995 memorandum in State v. Dann, showing how the State could have appealed the 1992 dismissal of the prosecution against Mr. Wurzberger:

First, the State's Attorney could have preserved the State's right to appeal simply by asking this Court not to enter final judgment until he had again appealed to the Vermont Supreme Court. This could have been incorporated in the "other proceedings as justice and the state of the cause may require" mentioned in 13 V.S.A. § 7403(a). He could have done this as soon as the Supreme Court refused his appeal of this Court's 20 August 1992 order granting Mr. Wurzberger's motion for return of property. He should have done this as soon as Mr. Wurzberger moved to dismiss the Information in September 1992. Instead, not only did the State's Attorney make no attempt to postpone a final decision while he appealed the dismissal (as opposed to the non-dispositive order to return property), but he did not even file opposition to Mr. Wurzberger's Motion to Dismiss.

The Vermont Supreme Court held the above-suggested procedure of postponing final judgment to allow an appeal appropriate in State v. Felch, 92 Vt. 477,489, 105 A. 23 (1918). Postponing the final judgment in Felch let the State appeal the end decision in a criminal case. Felch was decided in the days when the language of 13 V.S.A. § 7403(a), which now applies only to appeals in misdemeanors, applied to all appeals by the State in criminal cases. See State v. Saari, 152 Vt. 510,513, 568 A.2d 344 (1989) (no misdemeanor appeals allowable after final judgment). It therefore relates to this misdemeanor case. The State's Attorney must have known of the option that the Felch decision gave him, for it is annotated under 13 V.S.A. § 7403 in the present main volume in Vermont Statutes Annotated (Equity 1974).

After postponing final judgment, the State's Attorney then could have appealed to the Vermont Supreme Court within seven days of the "entry of the judgment or order appealed from." V.R.A.P. 4. The "order appealed from" would have been this Court's dismissal in State v. Wurzberger. In this manner, the State's Attorney could have obtained review of this

> Court's ruling on constitutionality while clearly complying with 13 V.S.A. §7403.
>
> The second flaw in the State's Attorney's §7403 argument is his unrealistic assumption that, since he neglected to deal with § 7403(a) as suggested above, the Vermont Supreme Court would have denied the State relief in a V.R.A.P. 21(b) original action for extraordinary relief -- even though the sole issue was the trial court's declaring a state statute unconstitutional. State's Response to Defendant's Supplemental Support (dated 8 March 1995) at 2 n. In State v. Saari, 152 Vt. 510, a misdemeanor case where constitutionality was an issue, the Supreme Court entertained just such an action. Moreover, the importance of questions of constitutionality is emphasized by provisions such as V.R.C.P. 24(d) and V.R.A.P. 44 which ensure that the Attorney General can intervene where no State's Attorney or other responsible state official is likely to defend the constitutionality of a state statute. Surely the Supreme Court would not ignore the purpose of its own rules and prevent a State's Attorney from defending a state statute from an attack on its constitutionality.

Without addressing the State's ability to appeal the 1992 dismissal, the Vermont court, presided over by a different judge than in 1987 and 1992, then denied Mr. Wurzberger's motion to dismiss. Infra p. 21a.

Before trial, the Vermont court granted the State's motion in limine to prevent Mr. Wurzberger from referring to his previous fireworks litigation. Infra p. 27a. It also said, id. at 30a,

> The Court is not going to allow Mr. Wurzberger to impose a specific additional defense based on his mistaken understanding that because Judge Grussing had ruled at the trial court level that this statute did not apply in one circumstance, that he was thereby insulated from any other prosecutions while the statute still remained on the books.

By stipulation, Mr. Wurzberger's objection to these rulings was preserved as if he had attempted to introduce the evidence at trial and the court had excluded it. Id. at 31a.

Mr. Wurzberger was convicted and appealed to the Vermont Supreme Court. He argued that "[a]llowing the state to prosecute Mr. Wurzberger in 1995 for selling the same items the District Court deemed legal in 1987 and 1992 would deny him due process." He argued that issue preclusion extends to questions of law as well as fact, citing United States v. Kramer, 289 F.2d 909 (2d. Cir. 1961). He cited other federal due process authority, Board of Electric Light Commissioners of the City of Burlington v. McCarren, 725 F.2d 176,178 (2d Cir. 1983), to support his res judicata arguments. He also argued that he lacked mens rea because he had reasonably relied on the Vermont trial court's 1987 and 1992 decisions regarding the same items on account of which he was charged in 1994.

The Vermont Supreme Court affirmed his conviction, infra p. 1a, and denied his motion for reargument, infra p. 32a. It held that issue preclusion did not apply because the State lacked a full and fair opportunity to litigate the constitutionality of the fireworks statute before. Infra pp. 7a-9a. Its first reason was that the State had a limited ability to appeal in misdemeanor cases. This limit was imposed not by the courts but by the legislature, through Vt. Stat. Ann. tit. 13 § 7403(a). Its second reason was a "doubt whether issue preclusion should apply in misdemeanor cases at all." Its third reason was that, because the trial court's earlier decisions were "unappealable," the resulting "inability to obtain a definitive ruling would be unfair to the State." The Vermont Supreme Court

held that claim preclusion did not apply because the dates of the alleged crimes differed. Infra p. 6a. Finally, the Vermont Supreme Court held that the defense of reasonable reliance on the decision of a lower court "was cut off by the grant of the motion in limine, which prevented the introduction of evidence to show reasonable reliance on prior decisions." It apparently found fatal to an appeal on this issue the fact that Mr. Wurzberger "has not appealed the ruling on the motion in limine." Infra p. 16a.

The Vermont Supreme Court's decision on issue preclusion rested on federal constitutional grounds. In its opinion, infra pp. 6a-7a, the Vermont Supreme Court stated "Collateral estoppel, or issue preclusion, is a constitutional right embodied in the Fifth Amendment guarantee against double jeopardy."

The Vermont Supreme Court's decision on claim preclusion rested at least partly on federal constitutional grounds. In its slip opinion at 4, the Vermont Supreme Court cited federal cases applying the doctrine to criminal prosecutions.

The Vermont Supreme Court's decision on the need to appeal an order in limine cited neither state nor federal authority. Before the Vermont Supreme Court rendered its decision, Mr. Wurzberger had not thought such a separate appeal was necessary. Nor, it appears, did the State. Infra p. 31a. Neither party therefore litigated the issue, so neither party cited any authority.

The jurisdiction of this Court to review the judgment of the Vermont Supreme Court is invoked under the Supremacy Clause of Article VI of the United States Constitution and 28 U.S.C. § 1257.

REASONS FOR GRANTING THE WRIT

I. Contrary to decisions of this Court and others, the Vermont Supreme Court denied Mr. Wurzberger due process by refusing to apply issue preclusion and thus shield him from relitigating the constitutionality of the fireworks statute.

By refusing to apply issue preclusion because the State lacked the absolute right to appeal the trial court's holding that the fireworks statute was void for vagueness and the trial court's resulting dismissal of the first prosecution, the Vermont Supreme Court decided an important federal question in a way that conflicts with relevant decisions of this Court and of various state courts of last resort. Consideration is thus appropriate under Supreme Court Rule 10(b) and (c).

A refusal to let a criminal defendant preclude litigation of an issue that was once finally decided in his favor is an important violation of the due process guarantees in the United States Constitution. In Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917), this Court stated (emphasis added)

> This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. *It is a rule of fundamental and substantial justice*, of public policy, and of private peace, which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect.

Accord Federated Dept. Stores v. Moitie, 452 U.S. 394,400 (1981). Specifically, res judicata involves due

process. Pittman v. La Fontaine, 756 F. Supp. 834,845 (D.N.J. 1991). In Pittman, the court dismissed a claim as precluded, holding that res judicata applied when the plaintiff had already had a full and fair opportunity to litigate her claim in state court. The court noted that claim preclusion would not apply if the state forum had not given the plaintiff due process, but it found that the state forum did honor this important constitutional guarantee.

It makes no difference whether the trial court erred when it held the fireworks statute unconstitutional in 1987 and 1992. In Moitie, 452 U.S. at 398, this Court held that the res judicata consequences of a final unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong. The petitioners in Moitie were part of a group of antitrust plaintiffs who were dismissed by the United States District Court for lack of standing. Some of them, but not the Moitie petitioners, appealed. The Court of Appeals reversed. The Moitie petitioners then filed their antitrust suit in state court, it was removed to the United States District Court, and that court dismissed their suit as res judicata on account of its previous decision (which had been reversed only as to the other petitioners). This Court upheld the dismissal.

Nor does it make any difference whether the State had the unqualified right to appeal the trial court's 1992 dismissal on the merits. In Johnson Co. v. Wharton, 152 U.S. 252,256 (1894), this Court specifically rejected the argument that res judicata applied only when the party against whom it is used had the right to appeal. Although it appeared "that the judgment in the first suit, by reason of the small amount in dispute, could not be reviewed by a court of

appellate jurisdiction," this Court forbade relitigation of the issues actually decided below. This Court surveyed the law and found no case suggesting that the application of res judicata was controlled by "whether the judgment in the first action could be reviewed upon appeal or writ of error." 152 U.S. at 260. Indeed, under some circumstances a final judgment may be res judicata even if it is still essentially appealable. Amcast Indus. Corp. v. Detrex Corp., 45 F.3d 155,158,160 (7th Cir.), cert. denied 515 U.S. 1103 (1995). Moreover, requiring absolute appealability is illogical in view of this Court's holding in Griffin v. Illinois, 351 U.S. 12 (1956) that states are not required to provide appellate review at all as long as they do not discriminate improperly.

Not only this Court and federal Courts of Appeals, but also state courts of last resort have decided res judicata cases in ways that conflict with the Vermont Supreme Court's decision. For example, in Burgess v. State, 772 P.2d 1272 (Mont. 1989), the Montana Supreme Court held the defendant estopped from relitigating a determination of constitutionality against the state even though he never appealed any higher than the Montana District Court. In Anderson v. Patterson, 189 Va. 793, 55 S.E.2d 1,4 (1949), the Virginia Supreme Court said the fact that amount in controversy in final judgment is so small that a defeated party has no right of appeal does not affect its operation as res judicata.

The State's lack of an absolute right to appeal the final judgment dismissing the first prosecution is particularly insignificant in this case, for three reasons.

First, the State did in fact present the constitutionality issue to the Vermont Supreme Court on interlocutory appeal -- whereupon that court refused

to hear it. Especially hard to square with due process is the Vermont Supreme Court's refusing to rule on the constitutionality of the fireworks statute in the first case and then refusing to give res judicata effect to the final judgment in that case because the State could not appeal it to the Vermont Supreme Court. When a state supreme court infringes federal due process rights in such a manner, this Court should accept certiorari and uphold the petitioner's federal rights.

Second, the State did not exhaust its reasonable appellate remedies after the initial determination of unconstitutionality in 1992. Mr. Wurzberger detailed what the State reasonably could have done, but never attempted to do. Supra pp. 5-6. The State filed no opposition to his 1992 motion to dismiss. This is important in light of this Court's decision in United States v. Munsingwear, 340 U.S. 36,39-40 (1950). The Court held the res judicata effect of an United States District Court judgment was not affected by the fact that a Court of Appeals had dismissed an appeal because the case became moot during pendency of appeal, where appellant acquiesced in dismissal and failed to move, in accord with established Supreme Court practice, to reverse or vacate the judgment and remand with direction to dismiss, a denial of which motion could have been reviewed by this Court. "If there was hardship in this case it was preventable." Id. at 41. In the instant case, any hardship was also probably preventable by one of the methods described supra pp. 5-6.

Finally, the State never even opposed Mr. Wurzberger's motion to dismiss the 1992 prosecution even though the motion argued that the fireworks statute was void for vagueness. It is difficult to distinguish this from the Munsingwear appellant's

acquiescence in dismissal, and the result should have been the same as in that case.

II. Contrary to decisions of this Court and others, the Vermont Supreme Court denied Mr. Wurzberger due process by refusing to apply claim prosecution and thus shield him from a second prosecution.

At the threshold, the Vermont Supreme Court questioned whether claim preclusion applies in criminal cases. It does, according to Courts of Appeals. In United States v. Cejas, 817 F.2d 595,598 (9th Cir. 1987), the court held that doctrines of claim as well as issue preclusion apply to criminal as well as civil proceedings, citing Ashe v. Swenson, 397 U.S. 436 (1970). Consequently, dismissal of an indictment on the ground that further prosecution was barred on double jeopardy grounds was a dismissal on the merits and thus precluded the Government from any further proceeding on that claim. Cf. United States v. Blackwell, 900 F.2d 742 (4th Cir. 1990); United States v. Castiglione, 876 F.2d 73,76 (9th Cir. 1988) ("A judge's ruling does not bar further prosecution if it does not represent a resolution in favor of the defendant on some or all of the factual elements of the offense charged."); United States v. Citron, 853 F.2d 1055,1058 (2d Cir. 1988) (doctrine of collateral estoppel, as applied in criminal prosecutions, bars Government from litigating issue decided in defendant's favor by valid final judgment). In Blackwell, the Court of Appeals held that, unlike that prong of double jeopardy protecting against successive prosecutions, the claim and issue preclusion aspect of the Double Jeopardy Clause is implicated by pretrial

disposition of a prior case if the ultimate issue in the second prosecution was conclusively litigated and necessarily determined in first case. 900 F.2d at 745, citing Ashe. Consequently, res judicata barred the Government from subjecting defendants to prosecution in the Middle District of North Carolina for a conspiracy which was alleged in an indictment in the Western District of Kentucky that was dismissed with prejudice. 900 F.2d at 744, citing United States v. Oppenheimer, 242 U.S. 85 (1916).

The Vermont Supreme Court held claim preclusion did not apply to claims arising on different dates. Infra p. 6a. Decisions of this Court and of federal Courts of Appeals disagree. In Nevada v. United States, 463 U.S. 110,131-34 (1983), the Government had in 1913 sued on behalf of an Indian reservation for water rights, and obtained some by settlement. In 1973, the Government sued for more water rights. This Court held that res judicata barred the action because the 1913 case involved same cause of action as 1973. In Engelhardt v. Bell & Howell Co., 327 F.2d 30 (1964), the court held the primary test for comparing causes of action for claim preclusion purposes is whether the primary right and duty and delict or wrong are same in each action. Id. at 32. Consequently, the plaintiff's claim for future damages on account of a continuing conspiracy creating a new cause of action with each invasion of his interest was barred under res judicata by a prior dismissal where all parties in all actions were identical and the plaintiff asserted only continuing violations of the type asserted in the prior actions. Id. at 35-36.

In the following cases, where the Courts of Appeals said actions were barred by collateral estoppel (issue preclusion), the true ground appears to be claim

preclusion because the Courts of Appeals said the whole suit, not merely an issue, was barred. In Miller v. Illinois Dept. of Corrections, 107 F.3d 483 (7th Cir. 1997), the court held that, if an employee reapplies for the same job that she was recently turned down for and is again rejected, a new ADA suit because of the second rejection is barred. In Union Carbide Corp. v. Commissioner of Internal Revenue, 671 F.2d 67 (2d Cir. 1982), the court held it appropriate to bar the Commissioner from relitigating with the same taxpayer the precise legal issue (applicability of a Treasury Regulation) on which the Commissioner had already lost for prior year.

III. Contrary to law implicit in decisions of this Court and explicit in decisions of Courts of Appeals, the Vermont Supreme Court denied Mr. Wurzberger due process by requiring him to appeal separately the exclusion of evidence that he reasonably relied on the trial court's prior holding of unconstitutionality.

By holding that an appeal of a final criminal judgment does not include an appeal of decisions in limine earlier in the case, the Vermont Supreme Court further violated Mr. Wurzberger's federal due process rights. That same court had already established that the only way to appeal a decision in limine was to appeal the resulting final judgment. In State v. Dubois, 150 Vt. 600, 556 A.2d 86 (1988), the Vermont Supreme Court had held that a discretionary denial of a motion in limine was inappropriate for an interlocutory appeal. Its discussion indicated it would rule the same on a discretionary grant of a motion in limine.

The Vermont Supreme Court's holding in this case is not only inconsistent with its own holding in Dubois but also contrary to the reasoning in Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978). The Court of Appeals said failure to appeal an order staying a civil suit pending arbitration did not prevent plaintiff from attacking the validity of an arbitration clause on appeal from a judgment denying a motion to vacate the arbitration award and confirming the award. Id. at 353. "Failure to take an authorized appeal from an interlocutory order does not preclude raising the question on appeal from the final judgment." Id. Yet here, the Vermont Supreme Court penalized Mr. Wurzberger for not appealing a ruling in limine even though it was only interlocutory.

The Vermont Supreme Court's decision further offends due process by ignoring an agreement between the parties and the trial court that, at trial, Mr. Wurzberger attempted to raise the defense of reasonable reliance on a judicial decision and the trial court refused to let him do it. The record shows a stipulation that preserves Mr. Wurzberger's objection to excluding the evidence of reasonable reliance on prior decisions. Infra pp. 30a-31a.

The Vermont Supreme Court's treating his appeal as if it did not include this issue cannot be squared with the due process guarantee of the Fourteenth Amendment. By negative implication, at least, this Court has long held that due process includes the right to appeal any issue raised in the lower court. For instance, in Youakim v. Miller, 425 U.S. 231 (1976), this Court said it would not decide questions not raised or resolved in lower court. Courts of Appeals have stated the positive side. "In federal practice any question which has been presented to the

trial court for a ruling and not thereafter waived or withdrawn is presented for review." Ballantine v. Central Railroad of New Jersey, 460 F.2d 540,544-45 (3d Cir. 1972).

This Court should review the Vermont Supreme Court's decision not only to afford Mr. Wurzberger due process but also to avoid encouraging piecemeal litigation.

CONCLUSION

Because the Vermont Supreme Court's decision denies due process to a man who reasonably relied on prior court decisions and cannot be reconciled with decisions of this Court, of Courts of Appeals, and of state courts of last resort, the petitioner prays that this Court grant certiorari.

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APPENDIX A

VT. SUPREME COURT
Filed in Clerk's Office
Aug 08 1997.

ENTRY ORDER

SUPREME COURT DOCKET NOS. 96-178 & 96-179

SEPTEMBER TERM, 1996

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont
Carl L. Dann	}	Unit No. 1, Windham Circuit
	}	
	}	DOCKET NO. 1572-12-94Wmcr
State of Vermont	}	
	}	
v.	}	
	}	
Albert Wurzberger	}	DOCKET NO. 70-1-95Wmcr

In the above-entitled case, the Clerk will enter:

Affirmed.

FOR THE COURT:

John A. Dooley
John A. Dooley, Associate Justice

Concurring:

Frederic W. Allen
Frederic W. Allen, Chief Justice

Ernest W. Gibson III
Ernest W. Gibson, III, Associate Justice

James L. Morse
James L. Morse, Associate Justice

Denise R. Johnson
Denise R. Johnson, Associate Justice

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Nos. 96-178 & 96-179

State of Vermont	Supreme Court
v.	On appeal from Vermont District Court of
Carl L. Dann	Unit No. 1, Windham Circuit
State of Vermont	
v.	
Albert Wurzberger	

Theresa S. DiMauro, J. (96-178)
John P. Wesley, J. (96-179)

James Maxwell, Windham County Deputy State's Attorney, Brattleboro, for plaintiff-appellee

Herbert G. Ogden, Jr., of Harlow Liccardi & Crawford, P.C., and Karen Abatiel! Kalter, Rutland, for defendants-appellants

PRESENT: Allen, C.J., Gibson, Dooley, Morse and Johnson, JJ.

DOOLEY, J. Defendants appeal related convictions for the sale and possession of fireworks in violation of 20 V.S.A. § 3132(a). Defendant Albert Wurzberger was the owner and operator of the 1836 Country Store in Wilmington. The State charged that defendant Wurzberger sold fireworks and that defendant Carl Dann possessed fireworks. Defendants argue that the trial court erred (1) in declining to apply claim preclusion to Wurzberger's case, (2) in declining to apply issue preclusion to either case, (3) in upholding the fireworks statute against a void-for-vagueness claim, (4) in improperly instructing the jury on mens rea, (5) in refusing to disqualify Judge DiMauro, and (6) in denying as untimely Wurzberger's motions to dismiss on the grounds of selective prosecution and contractual bar to prosecution. We affirm.

On two prior occasions, in 1987 and 1992, the State had unsuccessfully attempted to prosecute defendant Wurzberger for the sale of fireworks. In 1987, the State obtained a search warrant to seize fireworks from Wurzberger's store. After the warrant was executed, Wurzberger moved for return of the property. The district court held that 20 V.S.A. § 3131, which defines "fireworks," was unconstitutionally vague as applied to Wurzberger and ordered the State to return the items seized under the warrant. The State decided not to press charges against Wurzberger, and Wurzberger later alleged that the State agreed not to prosecute him for selling identical fireworks any time in the future.

In 1992, the State obtained another search warrant to seize fireworks from Wurzberger's store, and subsequently charged him with violating 20 V.S.A. § 3132(a), which prohibits the sale "at retail or wholesale" of fireworks, unless within specified exceptions. Holding that the fireworks statute was overbroad, the trial court again ordered the return of the items seized from Wurzberger's store. The State sought permission to appeal the order in both the trial court and in this Court, and was denied. Thereafter, the court dismissed the criminal case against Wurzberger.

The current appeals stem from two separate incidents in 1994. On May 2, 1994, Chief Thomas Donnelly of the

Wilmington Police Department went to defendant Wurzberger's store and purchased various items including "Mystical Night Fireworks," "Flight of the Phoenix Fireworks," and "Big Bear Fireworks." Officer Donnelly also purchased items labelled as sparklers, and an unlabelled item that he believed to be a sparkler. Wurzberger was thereafter charged with selling fireworks.[1] On November 17, 1994, in the related case of defendant Dann, several officers went to Dann's apartment to execute a search warrant. They seized various items from Dann's living room that they believed to be fireworks, and Dann was subsequently charged with possession of fireworks.

Dann's trial took place on December 6, 1995, followed the next day by Wurzberger's trial. Judge Theresa DiMauro presided over pretrial matters in both cases, and over the trial in Dann's case. Because of scheduling conflicts, Judge John Wesley presided over Wurzberger's trial. Both defendants were convicted by jury, and this consolidated appeal followed.

I.

Defendant Wurzberger's first claim of error is that his prosecution was barred by the doctrine of claim preclusion because a final judgment was issued in his favor in 1987 and 1992, and the prior cases involved the same parties, subject matter and causes of action. In prior cases, we have distinguished between claim preclusion, which is also called res judicata, and issue preclusion, sometimes referred to as collateral estoppel. See, e.g., Longariello v. Windham Southwest Supervisory Union, __ Vt. __, __, 679 A.2d 337,338 (1996); Cold Springs Farm Dev. v. Ball, 163 Vt. 466,468, 661 A.2d 89,91 (1995). Defendant Wurzberger raises the defense of claim preclusion, and both defendants raise issue preclusion. We turn first to claim preclusion.

Claim preclusion will bar subsequent action only if the court issued a final judgment in the previous action, and "the

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[1] Defendant was also charged with offering fireworks for sale on December 9, 1994, when a police investigator observed fireworks for sale at the store. This count was dismissed and is not involved in this appeal.

parties, subject matter and causes of action are identical or substantially identical." Berisha v. Hardy, 144 Vt. 136,138, 474 A.2d 90,91 (1984). "Claim preclusion bars litigation of claims or causes of action which were or might properly have been litigated in a previous action." Cold Springs Farm Dev., 163 Vt. at 472, 661 A.2d at 93. For the purposes of claim preclusion, two causes of action are the same if they can be supported by the same evidence. See Hill v. Grandey, 132 Vt. 460,463, 321 A.2d 28,31 (1974); see also Stratton v. Steele, 144 Vt. 31,35, 472 A.2d 1237,1239 (1984) (adopting logical relationship test). The doctrine of claim preclusion promotes judicial economy by requiring litigants to aggregate claims and compulsory counter claims; its purpose is to protect courts and parties from the burdens of relitigation. Russell v. Atkins, __ Vt. __, __, 679 A.2d 333,335 (1996).

We have not conclusively decided whether claim preclusion, a concept more commonly raised in civil litigation, pertains to criminal proceedings. In several cases, the United States Supreme Court held that the broader doctrine of "res judicata" applied to criminal as well as civil cases. See Sealfon v. United States, 332 U.S. 575,580 (1947) (acquittal in conspiracy trial was res judicata as to the essential facts in second prosecution); United States v. Oppenheimer, 242 U.S. 85,87-88 (1916) (judgment dismissing indictment on ground that prosecution was barred by statute of limitations was res judicata as to second indictment for same offense). Since Sealfon and Oppenheimer were decided, however, courts have clarified what is meant by the term "res judicata," and have differentiated between claim preclusion and issue preclusion. Focusing on this distinction, the term "res judicata" as used in Sealfon and Oppenheimer is more accurately characterized as issue preclusion. Even if we held that claim preclusion applies to criminal cases, an issue we do not reach, we would conclude that claim preclusion does not bar prosecution of defendant Wurzberger.

The action against defendant Wurzberger is not barred by claim preclusion because, although the parties and causes of action may have been the same in 1987, 1992, and 1994, the subject matter is not. Wurzberger is charged with a crime, the

sale of fireworks, that is capable of frequent repetition. Each even is separate, however, and gives rise to separate liability. See Turner v. Bragg, 118 Vt. 43,45-46, 100 A.2d 431 (1953) (since each instance of trespass is separate, former judgment covering trespasses up to certain date is not res judicata with respect to later trespasses.)

In similar cases involving double jeopardy claims, we have held that each alleged act is a separate matter. See State v. Ramsay, 146 vt. 70,74, 499 A.2d 15,18 (1985) (although alleged assaults by defendant on wife occurred on consecutive days, different dates and acts were involved); State v. Pianfetti, 79 Vt. 236,246 65 A. 84,86 (1906) (where defendant was charged with selling illegal liquor on numerous occasions, defendant must show that prior convictions concerned same act to sustain plea of autrefois convict). Other courts considering claims of res judicata or collateral estoppel are in accord. See, e.g., State v. Ell-Gee, Inc., 255 So. 2d 542,545 (Fla. Dist. Ct. App. 1971) (each performance of play constitutes separate act); Village of Northbrook v. Cannon, 377 N.E.2d 1208,1213 (Ill. App. Ct. 1978) (prior acquittals of alleged dog-ordinance violations are not res judicata because not same matter). In addition, the purpose of claim preclusion -- to encourage parties to aggregate related claims arising from the same transaction or event -- would not be served in this case because the State could not rationally aggregate claims arising from acts separated by years. Since there is no identity of subject matter in the 1987, 1992 and 1994 proceedings, the trial court properly declined to apply claim preclusion to defendant Wurzberger.

II.

The second claim of error, raised by both defendants, is that the court was bound by its 1987 and 1992 rulings under the doctrine of issue preclusion. Collateral estoppel, or issue preclusion, is a constitutional right embodied in the Fifth Amendment guarantee against double jeopardy, Ashe v. Swenson, 397 U.S. 436,445 (1970), and there is no question that it applies to criminal cases. See In re Smith, 146 Vt. 43,45, 498 A.2d 497,499 (1985). Defendants contend that, since the court previously the fireworks statute unconstitutional, the issue cannot be relitigated.

The elements of issue preclusion are:

> "(1) preclusion is asserted against one who was a party or in privity with a party in th earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair."

State v. Stearns, 159 Vt. 266,268, 617 A.2d 140,141 (1992) (quoting Trepanier v. Getting Organized, Inc., 155 Vt. 259,265, 583 A.2d 583,587 (1990). Although the State contests this conclusion, we can assume for purposes of analysis that the first three elements are met. The party against whom preclusion is asserted, the State, is the same in all cases; the decisions relating to the constitutionality of the statute were final judgments on the merits, compare Washington v. United States, 366 A.2d 457,459 (D.C. 1976) (dismissal of indictment for failure to charge all elements is not judgment on merits); and defendants raise the same issue here -- the constitutionality of the fireworks statute -- as was raised by defendant Wurzberger in 1987 and 1992.

We hold, however, that the State did not have a "full and fair" opportunity to litigate the constitutionality of the statute in prior proceedings, and that application of issue preclusion to these proceedings would not serve the interests of justice. In deciding whether these two elements are met, the court must look at the circumstances of each case. Trepanier, 155 Vt. at 265, 583 A.2d at 587. Among the factors to consider are "the type of issue preclusion [offensive or defensive], the choice of forum, the incentive to litigate, the foreseeability of future litigation, the legal standards and burdens employed in each action, the procedural opportunities available in each forum, and the existence of inconsistent determinations of the same issue in separate prior cases." Id. (footnotes omitted).

First, the State's limited ability to appeal misdemeanor cases denied the State a full and fair opportunity to litigate the constitutionality of the fireworks statute. The State may not appeal final rulings in misdemeanor cases, see 13 V.S.A. § 7403(a), (b); State v. Saari, 152 Vt. 510,513, 568 A.2d 344,346-47 (1989), and must obtain permission to appeal interlocutory orders. Saari, 152 Vt. at 513, 568 A.2d at 347; V.R.A.P. 5 and 5.1. Here the State requested permission in 1992 from both the trial court and, when permission was denied, from this Court, to appeal the order requiring the State to return the items seized from Wurzberger's store. Both the trial court and this Court denied the State's requests to appeal. Defendants suggest that the State could have asked for a delay in the entry of final judgment so that it could have requested permission to appeal a second time, see State v. Felch, 92 Vt. 477,489, 105 A. 23,28 (1918), or could have filed a petition for extraordinary relief. See V.R.A.P. 21; Saari, 152 Vt. at 514-15, 568 A.2d at 347 (granting petition for extraordinary relief where sentencing of misdemeanor conviction was at issue). The procedures urged by defendant again request a favorable exercise of discretion. We do not believe that State must repetitively request such action. We believe the State made adequate efforts to appeal and litigate this issue, and was denied that opportunity.

Second, we doubt whether issue preclusion should apply to misdemeanor cases at all. The State's incentive to litigate misdemeanor cases is finite, especially when balanced against its scarce resources and overriding interest in prosecuting felonies. See generally A. Vestal and J. Coughenour, Preclusion/Res Judicata Variables; Criminal Prosecutions, 19 Vand. L.R. 683,688 (1966). Along these lines, we have previously held that a civil license-suspension proceeding does not collaterally estop the State from relitigating the same issues in a criminal proceeding, given the State's minimal incentive to litigate issues in a civil suspension proceeding. Stearns, 159 Vt. at 271-72, 617 A.2d at 143.

Third, we do not believe it would serve the interests of justice to apply issue preclusion to these proceedings. The constitutionality of the fireworks statute would remain an elusive issue if we continually applied the doctrine of issue preclusion to

unappealable orders of the trial court. This inability to obtain a definitive rule would not be fair to the State. See American Trucking Assocs. v. Conway, 152 Vt. 363,371, 566 A.2d 1323,1328 (1989) (allowing potentially unconstitutional statute to stay in effect because of res judicata would needlessly exalt form over substance); Restatement (Second) of Judgments § 28(5) (1982) (public policy exception to issue preclusion). We therefore turn to the merits of the appeal.

III.

The third claim of error is that the definition of fireworks contained in 20 V.S.A. § 3131 and referred to in § 3132(a) is unconstitutionally vague. Due process requires that criminal statutes define proscribed conduct with sufficient specificity as to provide fair warning to potential offenders and to avoid arbitrary and discriminatory enforcement. See Benning v. State, 161 Vt. 472,483, 641 A.2d 757,763 (1994). When First Amendment interests are not involved, a defendant may not challenge a statute's application to others. See State v. Cantrell, 151 Vt. 130,133, 558 A.2d 639,641 (1989). Rather, the statute must be examined as applied to the defendant and the circumstances before the court. See id. Defendants concede that their First Amendment rights are not implicated in this case. We therefore analyze their void-for-vagueness claim in the light of the facts presented. See id; Benning, 161 Vt. at 483, 641 A.2d at 763.

Section 3131 provides the following definition of "fireworks":

> The term "fireworks" shall mean and include any combustible or explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible or an audible effect by combustion, explosion, deflagration or detonation, and shall include blank cartridges, toy pistols, toy cannons, toy canes, or toy guns in which explosives are use, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, sky rockets, Roman candles, Daygo bombs, sparklers or other

> fireworks of like construction and any fireworks containing any explosive or flammable compound, or any tablets or other device containing any explosive substance, except that the term "fireworks" shall not include toy pistols, toy canes, toy guns, or other devices in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for use, and toy pistol paper caps which contain less than twenty-hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times. . . .

20 V.S.A. § 3131 (emphasis added).

Defendant Wurzberger was charged with selling, and defendant Dann with possessing, fireworks as defined in 20 V.S.A. § 3131. At defendant Wurzberger's trial, Chief Donnelly testified that he bought seven items at defendant's store on May 2, 1994. The largest of the items was a package labelled "Mystical Night Fireworks," inside of which were smaller packages labelled "Jade Flowers," "Chinese Fireworks," and "Tiger's Roaring Fountain." Chief Donnelly indicated that he also bought a package labelled "Flight of the Phoenix Fireworks," a package labelled "Big Bear Fireworks," and a thirty-six-inch metal sparkler. The majority of the items were marked as either registered fireworks or Class C fireworks. The next day Officer Donnelly ignited some of the items at the Brattleboro Firearm Range to verify that the items were fireworks as labelled.

At Dann's trial, a police officer testified that he and two other officers executed a search warrant of Dann's apartment on November 17, 1994. The police seized twenty-seven different packages of alleged fireworks. The items had identifying labels with names ranging from "Tiger Fury." "Jumble 20 Rocket Fountains," and "Flower Gardens" to "Glory Torch," "Peach Flower" and "Blue Star." The majority of the items were

marked as consumer fireworks, had fuses on tope, and had warning labels that said, "Emits shower of sparks."

Most of defendants' arguments involve the poor drafting of § 3131. For example, defendants note that "a sparkler may be anything from a diamond ring to a carbonated wine drink." They argue that the term "firecracker" is vague because it does not specify the explosive power necessary to qualify for the term. Further, they argue that labels are unreliable because the terms involved are commonly used on labels of items that are not explosive devices. In general, these arguments ignore the fact that a void-for-vagueness claim that does not implicate the First Amendment must be analyzed in light of the facts presented. Thus, it is not relevant to our analysis that the term "sparkler" can be applied to an item that does not involve a "combustible or explosive composition," that other items can be labelled as fireworks or firecrackers, or that items of insignificant explosive power come within the statutory definition.

We have no difficulty concluding that a person of ordinary intelligence would know that the items sold by Wurzberger and seized from Dann were "fireworks" within the meaning of 20 V.S.A. §§ 3131 and 3132(a). Most of the items had fuses and were labelled as fireworks. Several of the items, some of where were not labelled, were readily identifiable as sparklers. In an earlier case challenging a motorcycle helmet law as void for vagueness, we commented that "[t]he easiest method [for determining whether a helmet is approved under the statute] is by labelling." Benning, 161 Vt. at 484, 641 A.2d at 764. Likewise here, defendants could read the packages' labels to determine their contents. The definition of "fireworks" did not make the prohibitory statute, 20 V.S.A. § 3132(a), void for vagueness as applied to the facts of these cases.

Defendants nonetheless contend that the statute does not contain sufficiently precise standards to avoid arbitrary and discriminatory enforcement. To support this argument, defendants allege that Officer Werner had to consult with the Department of Transportation and the American Pyrotechnic Institute to determine whether the items in question were fireworks. A similar argument was raised in Benning. 161 Vt.

at 484, 641 A.2d at 763. As in Benning, we reject defendants' suggestion that "disagreement over how the statute should be implemented" amounts to a showing vagueness. Id. Moreover, the fact that there might be a risk of arbitrary or discriminatory enforcement as to others does not aid these defendants. Viewed in the light of the fact presented, we conclude that the defendants were not subject to arbitrary or discriminatory enforcement of the statute.

IV.

The fourth claim of error is that the jury instructions failed to charge that mens rea is an element of 20 V.S.A. § 3132(a). This issue surfaced on December 5, 1995, the day before Dann's trial and two days before Wurzberger's trial, when the State filed motions in limine in both cases to exclude evidence of the 1987 and 1992 seizure of fireworks from Wurzberger's store. In response, each defendant filed proposed jury instructions, along with a memorandum arguing that mens rea is a required element of the offense. The proposed instructions required the jury to find that "defendant intended to do the specific act which is an essential element of the offense" and that defendant acted with "some bad purpose."

Both Judge DiMauro and Judge Wesley charged the jury that, in order to convict, it must find that defendants acted "knowingly" and that their acts were "voluntary and conscious and not because of mistake, inadvertence, accident or some other innocent mistake." Neither judge adopted the "specific act" or "bad purpose" language in defendants' proposed jury instructions. Judge DiMauro's charge, however, included language that was functionally equivalent to the "specific act" and "bad purpose" instructions; we therefore see no grounds for

reversal as to defendant Dann on this issue.[2] Wurzberger objected to the charge because it was not as he proposed.

In his brief to this Court, defendant Wurzberger argues generally for a "mens rea" instruction, as he did below. Defendant does not specify the error in the intent charge; he claims instead that the trial court's instruction amounted to a charge of strict liability. While we address the issue of what mental state is required by 20 V.S.A. § 3132(a), we seriously question whether defendant has properly preserved an objection. Cf. Weaver v. Brush, __ Vt. __, __. 689 A.2d 439, 445 (1996) (objection that fails to address inadequacies in charge actually given does not comply with V.R.C.P. 51(b); same wording in V.R.Cr.P. 30). We consider (1) whether the offense of selling fireworks requires intent to sell fireworks, and (2) whether the offense of selling fireworks requires the jury to find that defendant intended to do something unlawful. See State v. Mott, __ Vt. __, __, 692 A.2d 360, 365-66 (1997) (addressing what mental element is required for offense).

In looking at the mental element in the context of this case, we stress three factors. First, when considering statutory crimes without a common-law antecedent, the determination of the required mental element is a question of statutory construction. See id. Thus, our goal is to give effect to legislative intent, and in doing so we consider the subject matter of the law, its effects and consequences, and the reason and spirit of the law. See Lane v. Town of Grafton, __ Vt. __, __, 689 A.2d 455, 456 (1997). Second, we emphasize that we are reviewing a specific charge in a specific case. Thus, the standard

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[2] Judge DiMauro charged the jury that, in order to convict, it had to find that Dann knowingly possessed fireworks and that he acted unlawfully: "For the act to be unlawful, it must have been done willfully, contrary to law. In other words, the act must be shown to have been done in disregard of the law or to disobey the law." This added language required the jury to find that defendant intentionally disobeyed the law, as defendant requested in his proposed instruction.

of review is whether the instructions taken as a whole breathe the true spirit of the law, such that the jury has not been misled. See State v. Roy, 151 Vt. 17, 24, 557 A.2d 884, 889 (1989). Even if the instructions are not as well-worded as we or the appellant might desire, we will not reverse a conviction for error in the instructions if that standard has been met. Third, we note that the offense of selling fireworks is not defined in terms of the results of the sale -- for example, the injury that might be caused by the use of fireworks. In such cases, the mental element may have to be expressed in terms of that result, introducing a component of conscious wrongdoing. See 1 American Law Institute, Model Penal Code § 2.02(2)(b)(i). (ii). Nothing in the statutory scheme suggests that a defendant must intend to bring about harm to purchasers or believe that such harm will result.

As a preliminary matter. we agree with defendants and the trial court that § 3132(a) does not create a strict-liability offense, despite the absence of a mental element in the statute. See State v. Audette, 149 Vt. 218, 221, 543 A.2d 1315, 1317 (1988) (when Legislature is silent as to mens rea required for particular offense, Court will not simply assume that statute creates strict liability offense). We next determine whether the offense requires an intent to sell fireworks.

As the United States Supreme Court has observed, "The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978). We have often described the mental-state requirement as one of scienter, or knowledge. See State v. Kerr, 143 Vt. 597, 604-05, 470 A.2d 670, 673-74 (1983). In the leading case of State v. Audette, we reversed a kidnaping conviction because the jury instructions failed to require that the defendant acted "knowingly or purposefully with regard to his actions which constituted forcibly confining the victim." 149 Vt. at 223, 543 A.2d at 1318.

For some crimes the distinction between knowledge and intent can be important. See Mott, __ Vt. at __, 692 A.2d at 366. In Mott, the defendant was charged with sending a letter in

violation of an abuse prevention order, and we held that intent to send the letter supplied the necessary mental element even if the defendant had no actual knowledge that the sending of the letter violated the order. We reasoned from the statutory scheme that it was the defendant's responsibility to read and obey the abuse prevention order and he could not rely on ignorance of its terms to avoid criminal responsibility. Here, we see little difference between an intent to sell fireworks and a knowing sale of fireworks. See State v. Lang, 164 Vt. 598, 598, 664 A.2d 267, 268 (1995) ("knowing restraint" under kidnapping statute is shown if State proves "defendant intended 'to accomplish the precise act which the law prohibits"') (quoting Audette, 149 Vt. at 220, 543 A.2d at 1316). Both convey basically the same concept and appear to be consistent with the statutory scheme; either would be consistent with our standard of review. Thus, there was no error in failing to charge, as requested, that defendant must have intended to commit the elements of the offense.

Defendant Wurzberger also sought an instruction requiring the jury to find that he intended to do something he knew was illegal. We do not believe, however, that a requirement of intent to violate the law is consistent with the statutory scheme before us. We have generally applied the maxim "Ignorantia legis non excusat" with the corresponding rule that everyone must be conclusively presumed to know the law. See State v. Fanger, 164 Vt. 48, 53, 665 A.2d 36, 38 (1995); State v. Woods, 107 Vt. 354, 356-57, 179 A. 1, 2 (1935). Thus, we cannot accept ignorance of the law as a blanket defense. Under defendant's formulation, a retailer may sell fireworks as long as he has never determined whether such a sale is unlawful. There is no indication of legislative intent to allow such a defense. We therefore hold that the jury instruction on the mental element required for the crime of selling fireworks breathed the spirit of the law and did not mislead the jury. There is no error in it.

In rejecting Wurzberger's definition of the required mental element, we do not suggest that a defendant's understanding of the law is always irrelevant to criminal liability. Thus, it may be a defense to criminal liability under a criminal

statute that the defendant reasonably relied upon a judicial decision declaring the statute unconstitutional. See United States v. Albertini, 830 F.2d 985,989 (9th Cir. 1987); see generally I W. LaFave & A. Scott, Substantive Criminal Law, at 5.1(e)(2), at 592 (1986) (reasonable reliance on decision of lower court may be raised as defense). Wurzberger never formulated this defense, and it was cut off by the grant of the motion in limine, which prevented the introduction of evidence to show reasonable reliance on prior decisions. He has not appealed the ruling on the motion in limine. To the extent that Wurzberger should have been able to show that it was unfair to charge him criminally after the earlier rulings, the means to do this was not through an expanded definition of the crime that made his knowledge of the law an element of the offense.

V.

The fifth claim of error concerns the denial of defendants' motion to disqualify Judge Theresa DiMauro, who presided over pretrial matters in both cases and over the trial in defendant Dann's case. Defendants filed a motion to recuse Judge DiMauro, asserting that their counsel had learned from another lawyer that the judge "is a good friend of State's Attorney Dan Davis." They also moved for permission to depose State's Attorney Davis. Judge DiMauro refused to disqualify herself, stating that there is "absolutely no social relationship between myself" and Davis, and no social relationship between her husband and Davis. She referred the motions to the Administrative Judge, who denied both motions because they were based on "nothing more than innuendo and unsubstantiated suspicions." Defendants moved to reconsider, attaching an affidavit of their lawyer, who stated that he had learned of the social relationship from another lawyer, who in turn learned it from Davis. The other lawyer would not give an affidavit. The Administrative Judge denied the motion to reconsider.

Defendants apparently rely on A.O. 10, Canon 3E(1), which requires a judge to disqualify herself "in a proceeding in which the judge's impartiality might reasonably be questioned." Pursuant to V.R.Cr.P. 50(d), the final arbiter of a motion to disqualify a judge is the Administrative Judge for Trial Courts.

We review the decision of the Administrative Judge for abuse of discretion. State v. Putnam, 164 Vt. 558, 564, 675 A.2d 422, 426 (1996). We will reverse only "if the record reveals no reasonable basis for the decision." Ball v. Melsur Corp., 161 Vt. 35, 40, 633 A.2d 705, 710 (1993).

We discussed in detail the standards applicable to motions to disqualify in Putnam, and we will not reiterate them all here. We stress that in general the Canon does not involve per se disqualification rules for particular types of relationships and it is the movant's burden to make a record on which a disqualification decision can be reached. Putnam, 164 Vt. at 562-63, 675 A.2d at 424-25. Here. the only allegation was that the judge is or was a "good friend" of the state's attorney, a description so broad that it might, or might not, embody activities that would cause one to reasonably question Judge DiMauro's actions in a criminal case brought in Windham County by the state's attorney's office.[3] It was well within the discretion of the Administrative Judge to find the allegation too broad and vague to support disqualification.[4]

We also affirm the decision of the Administrative Judge to deny defendants the opportunity to depose State's Attorney

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[3] As an additional reason to disqualify Judge DiMauro, defendant Wurzberger asserts that he had sued State's Attorney Davis in a civil rights action in federal court, and that Judge DiMauro's rulings on the constitutionality of the fireworks statute, res judicata and collateral estoppel would greatly affect the federal case. Wurzberger has not detailed the interrelationship between these cases, and it is not obvious. In any event, we have ruled that the decisions on the issues he specified were correct as a matter of law. Thus, even if some relationship with Davis affected these rulings, the effect is harmless.

[4] The motion to reconsider supported the allegation on which the motion to disqualify was based, but it was not more specific. It also demonstrated the third-hand nature of the allegation.

Davis. The Administrative Judge had discretion on whether to authorize the deposition. See V.R.Cr.P. 15(e)(4) (depositions are authorized in misdemeanor cases only on agreement of parties or for good cause shown). The allegation was so broad and vague that the Administrative Judge could view the deposition as a fishing expedition. On the other hand, a deposition of opposing counsel, or the supervisor of opposing counsel, necessarily chills the adversary system and should not be authorized without a clear showing of need. There was no abuse of discretion.

VI.

Defendant Wurzberger's sixth and seventh claims of error are that the court wrongly denied as untimely his motions to dismiss on the grounds of selective prosecution and contractual bar to prosecution. The trial court ruled that Wurzberger's motions were based on defects in the institution of the prosecution, and were not timely under Rule 12 of the Vermont Rules of Criminal Procedure. Rule 12 requires certain defenses and objections to be raised before trial and in a timely fashion. Among those are "[d]efenses and objections based on defects in the institution of the prosecution." V.R.Cr.P. 12(b)(1). Except as otherwise provided, all pretrial motions must be presented either at a scheduled status conference or, if no status conference is held, within twenty-eight days after arraignment. V.R.Cr.P. 12(c). The court need not consider motions that are untimely, and failure to raise prescribed issues, even issues based on constitutional grounds, will constitute waiver. V.R.Cr.P. 12(f); State v. Clark, 152 Vt. 304, 306, 565 A.2d 1332, 1333 (1989).

The Vermont rule is based on the similar federal rule. In Davis v. United States, 411 U.S. 233, 241 (1973), the Supreme Court described the policy reasons for imposing time limits on raising defenses based on defects in the institution of the proceeding:

> The waiver provisions of [federal] Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an

> alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial.

Because "[a] selective-prosecution claim is . . . an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution," United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996), the federal courts have held that both the policy behind Rule 12 and its wording require that a selective prosecution defense be raised by a timely motion to dismiss. See United States v. Mann, 884 F.2d 532, 539 (10th Cir. 1989); United States v. Jarrett, 705 F.2d 198, 204-05 (7th Cir. 1983); see generally 24 Moore's Federal Practice, § 612.05[3], at 612-20 n.9 (3d ed. 1997). We find the reasoning of these courts persuasive and hold similarly that a defense of selective prosecution is governed by V.R.Cr.P. 12(b)(1) and must be raised by pretrial motion.

For purposes of the time limit of Rule 12, we can find no relevant difference between the defense of selective prosecution and the defense of contractual bar. In this case, the latter defense was based on Wurzberger's assertion that in 1987 the state's attorney offered not to prosecute him for selling fireworks if he agreed not to sue the officer who searched his store. Wurzberger alleges that he accepted these terms, and a contract was formed. Like the defense of selective prosecution, Wurzberger's defense was that it was improper to bring this proceeding. Moreover, this defense is unrelated to the merits of the prosecution and may obviate the need to prepare for trial. Fair administration of justice requires that this defense be raised early before the case proceeds to the merits.

Rule 12(f) allows the court to grant relief from the waiver "for cause shown." Wurzberger argues that it was error to deny relief in this case. The motion to dismiss was made shortly after the cancellation of a jury drawing, some nine months after the expiration of the time limit set by Rule 12. Wurzberger gave no reason for the delay other than a claim that his research had not shown that the motion was subject to Rule 12(b)(1). He noted that he stated he would raise the defense of

contractual bar in a memorandum in support of an interlocutory appeal filed five months earlier. The trial court found that Wurzberger had not demonstrated good cause for relief from the waiver. This was a discretionary ruling, reversible here only for abuse of discretion. See State v. LaGoy, 136 Vt. 39, 41-42, 383 A.2d 604, 606 (1978). We conclude that the ruling fell within the court's discretion.

Affirmed.

FOR THE COURT:
John A. Dooley
Associate Justice

STATE OF VERMONT
WINDHAM COUNTY

STATE OF VERMONT
PLAINTIFF DISTRICT COURT

V.

ALBERT G. WURZBERGER
DEFENDANT DOCKET NO. 70-1-95

OPINION AND ORDER

Before the court are Defendant's Motion to Dismiss for Lack of Prima Facie case, and Motion to Dismiss for Lack of Probable Cause. Defendant is represented by Herbert G. Ogden, Esq.. Deputy State's Attorney James Maxwell represents the State. Defendant's motion was argued at arraignment on January 26, 1995. Defendant was present for this arraignment/motion hearing. Parties were given additional time to submit memos, and in fact, memos and replies have been submitted to the court until March 27.

Defendant has been charged with unlawfully selling fireworks in violation of 20 V.S.A. § 3132(a) on two separate occasions in 1994. He seeks to dismiss the action based on two arguments. He first argues that the statute under which he is being prosecuted is vague, and as such, violates Chapter 1, Article 10 of the Vermont Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In addition, Defendant argues that the doctrines of res judicata and collateral estoppel bar this prosecution. He had been previously charged with violations of 20 V.S.A. § 3132(a) in 1987 and 1992, with those prosecutions being dismissed under a void-for-vagueness analysis. See In re Wurzberger, (Vt. Dist., Nov. 9,1987) and State v. Wurzberger, (Vt. Dist., Aug. 20, 1992).

The court finds that the res judicata and collateral estoppel doctrines do not apply. As most recently stated by the Vermont Supreme Court, collateral estoppel, or issue preclusion, prevents a party from relitigating an issue that has necessarily been decided in a previous action. Cold Springs

Farm Development, Inc. v. Rene Ball, slip. op. 94-069, (April 7, 1995) at 2 (citing Berisha v. Hardy, 144 Vt. 136, 138 (1984)). Issue preclusion is appropriate when

(l)[it] is asserted against one who was a party or in privily with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5 ? applying preclusion in the later action is fair.

Cold Springs at 2 (citing Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990)). The court finds that in the two prior actions, the issue was whether on May the Vermont statute, 20 V.S.A. § 3132(a) was violated on July 2, 1987 and on May 21, 1992. The issue that must be resolved in the present case is whether Defendant sold fireworks in his retail store on May 2, 1994 and displayed fireworks and made them available for sale on December 9, 1994.

In the prior proceedings, the Court considered a collateral issue, the constitutionality of the statute itself. In 1987, the court considered the motion for return of property, and did not reach the merits of the case. Subsequently, in 1992, the same judge who had determined that the statute was vague, and therefore void in 1987, as applied to the facts before him at that time, was called upon to sign a search warrant. The warrant, signed by Judge Grussing, was issued for "all fireworks" and was not limited to the list of items contained in the affidavit. The fact that Judge Grussing found probable cause to search for and seize "all fireworks" is indicative of reasoning that a prior decision regarding the constitutionality of the statute was not intended to apply to all prosecutions under the statute, but was limited to the facts before him at the time. Vagueness challenges to statutes not involving First Amendment freedoms must be examined in light of the facts presented, and the court need not decide whether a statute passes constitutional muster under all possible applications. State v. Purvis, 146 Vt. In Purvis, the Vermont Supreme Court reviewed 441, 443 (1985). In the void-for-vagueness doctrine, stating that it stresses two aspects: (1) fair warning to potential offenders that their conduct is proscribed; and (2) sufficiently precise standards to

avoid arbitrary and discriminatory enforcement. Purvis at 442. The court examined 13 V.S.A. § 2601, "open and gross lewdness and lascivious behavior". Although the terms "lewdness" and "lascivious" are not defined in the statute, the Court found that it was sufficiently certain to inform a person of reasonable intelligence that the charged conduct was proscribed. Id. at 443.

Considering the above, the Court concludes that neither issue preclusion nor res judicata applies. The Court has previously considered violations of the applicable statute, and found that as applied to the facts and circumstances before it, the statute did not pass Constitutional muster. However, the issue, whether or not the Defendant has violated 20 V.S.A. § 3132(a), has not been fully litigated. This law has not been repealed or amended, and as such remains available to the State under which an individual may be prosecuted. Neither the State legislature nor the Supreme Court has acted to declare the statute unconstitutional. While this Court respects the prior decisions regarding the statute in question, it also finds that they are not binding or determinative of the ultimate issue, that is, whether this Defendant on the dates and times in question, sold the specific items in violation of a state law which prohibits the sale of fireworks.

Turning to Defendant's argument that the statute is void due to vagueness, the Court notes that an "explosive" is defined as a substance or combination of substances which, upon rapid decomposition or combustion, cause an explosion-that is, a violent bursting with expansion or noise. 31A Am. Jur. 2d Explosions and Explosives § 2. The term "fireworks" has been similarly defined by the Vermont legislature in § 3131 for the purposes of regulating or prohibiting conduct.

The statute in question was adopted by the Vermont Legislature in 1953. It states in part

> The term "fireworks" shall mean and include any combustible or explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible or audible effect by combustion,

> explosion, deflagration or detonation, and shall include blank cartridges, toy pistols, toy cannons, toy canes or toy guns in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, sky rockets, Roman candles, Dayglo bombs, sparklers or other fireworks of like construction and any fireworks containing any explosive or flammable compound, or any tablets or other device containing any explosive substance, except that the term "fireworks" shall not include toy pistols, toy canes, toy guns, or other devices in which paper cap containing twenty-five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for use. . . 20 V.S.A. § 3131.

The Court reads the statute as defining fireworks as any:

1. combustible or explosive composition or
2. substance or combination of substances or
3. article

prepared for the purpose of producing a visible or audible effect by combustion, explosion, deflagration or detonation. The statute lists some included general items "in which explosives are used", and names some in particular. It also includes fireworks containing any explosive or flammable compound or any tablet or device containing any explosive substance. The statute contains a list of items that are not included in the term "fireworks". It is noted that "[a] statute which defines fireworks to include, without limitation, certain specified items, but excludes others such as toy pistols, sparklers, or torches-which do not contain explosive charges, is not so vague, indefinite, or uncertain and ambiguous as to render it void and unenforceable." 31A Am. Jur. 2d Explosions and Explosives § 6.

Considering the above, this court concludes that the statute adequately defines the prohibited items, that is,

"fireworks", so as to notify an individual what actions relative to them are proscribed. The language of the statute, when viewed in the light of the present facts, is sufficiently clear to put the Defendant, a retail vendor, on notice that devices "which are intended to produce a visible or audible effect by explosion or combustion" are prohibited from wholesale or retail sale.

The Court now turns to Defendant's Motions to Dismiss, and finds that probable cause does exist. V.R.Cr.P. 4(b) provides that probable cause "shall be based upon substantial evidence". A challenge to probable cause to prosecute is a challenge to the arresting process, not a challenge to the merits of the allegation of crime. State v. Kelly, 131 Vt. 582, 589 (1973). Here, in May 1994, an officer catalogued and tested packages which were labelled as fireworks which he bought from the Defendant's store. Another officer observed fireworks for sale in Defendant's store in December 1994. Acting pursuant to a statute which makes the retail sale of fireworks unlawful, Defendant was arrested and charged with a violation of that law, 20 V.S.A. § 3132.

As to the Motion to Dismiss for Lack of Prima facie case, the State has evidence which supports each element of the charged offenses. The affidavit of Chief Donnelly states that Defendant sold at retail or offered for retail sale items which were packaged and labeled as fireworks, which also provided an '.audible or visual effect by combustion, explosion, deflagration or detonation" as set forth in the definition of "fireworks". 20 V.S.A. § 3131.

Taking the evidence in the light most favorable to the State and excluding modifying evidence, the State has set forth substantial, admissible evidence tending to reasonably show that defendant is guilty beyond a reasonable doubt. V.R.Cr.P. 12(d)(1); State v. Burnham, 145 vt. 161, 165 (1984).

Based on the above, Defendant's motions to dismiss are DENIED.

Entered at Brattleboro, Windham County, Vermont, this 5th of May, 1995.

Theresa S. DiMauro
Theresa S. DiMauro Presiding Judge

APPENDIX C

Oral Opinion granting State's second motion in limine

THE COURT: . . . . Mr. Ogden, do you wish to be heard with respect to the request going to mention or evidence of previous litigation? That also seems straight-forward to The Court, but I would hear you on how, how any such potential evidence would be relevant in this case.

MR. OGDEN: Two ways, Your Honor. First, as is indicated by a separate memorandum in the defendant's proposed jury instructions, we think that strict liability without a showing of mens rea can be imposed at most only if the statute carries only a fine, rather than a fine and imprisonment, or whether it carries imprisonment. There is a memorandum that I believe I brought in yesterday, I realize The Court may not have had time to look at it at all, demonstrating that generally the rule is there has to be a showing of mens rea. There's no evil deed without some sort of evil intent, even though it need not be the intent to violate that particular statute. Therefore, it's important that Mr. Wurzberger be allowed to show the two other orders of this Court, actually, three other orders. The one ordering the property returned in 1987, the one ordering the property returned in 1992, and the dismissal of the charges in 1992, all on constitutional grounds by Judge Grussing. Because with that knowledge, Mr. Wurzberger could not think that offering these things for sale was illegal as long as they were the same things on which Judge Grussing in this court had ruled on in the other three occasions.

The other reason is that I am not sure how to read the order of this Court issued through Judge D'Mauro back in I think it was the spring, denying the defense of res judicata. One way to read it is simply to say that even if all the objects are the same, if the State charges possession or sale on a different date, there's no res judicata effect, just because the date is different. I can't believe that's what The Court ruling meant to write. Under that rationale, Your Honor, people would still be being prosecuted for assisting abortions, for example, because the date

isn't the same as the date of Rowe v. Wade. So, that can't have been what The Court meant.

The other way to read it is that The Court simply didn't feel it had enough facts before it to determine whether the fireworks presently charged were the same as the fireworks that were charged in 1992 or seized in 1987.

Therefore, for both these reasons, Mr. Wurzberger should be allowed to refer to The Court's prior orders and also to compare what was seized this time and what was seized the other time to see whether in fact they are the same things.

THE COURT: Mr. Maxwell?

MR. MAXWELL: Thank you, Your Honor. If Mr. Wurzberger had items returned to him based on the litigation that occurred before Judge Grussing at an earlier date, and continued to -- and then continued to display and sell fireworks based on that understanding, it's not a defense today because the law was then and is still on the books. If he is permitted to get on the stand and argue, "I sold them because they gave them back to me, they said that the statute was unconstitutional," it would be misrepresenting the law, and it would effectively be saying that anyone who comes to their own understanding of what is legal or illegal can use that as a defense. And, as we know, ignorance of the law is no excuse. Mr. Wurzberger did not get the kind of counsel he needed in order to understand the limitations of Judge Grussing's rulings. That is not our issue today.

Our issue today is whether these items that were on display and sold were fireworks because the statute still prohibits that.

Your Honor, I just think, and I'll rest on my motion, comparing lists of what was seized then and what is seized now goes to Mr. Ogden's collateral estoppel, res judicata, a whole bunch of stuff which has been and will be litigated, I am sure. But not to what's before the jury today. And we think. . .

THE COURT; The Court, The Court agrees. There is an interesting legal issue here which, from The Court's point of view, had been framed and is preserved with respect to the prior order of Judge D'Mauro governing defendant's claim that this prosecution is barred on collateral estoppel, issue preclusion, res judicata grounds by Judge Grussing's previous determination that the statute was unconstitutional. That issue has been resolved by Judge D'Mauro's order. The questions of the effect of that, that have been raised this morning by Mr. Ogden, we are going to leave for a higher court to work through. I am not going to try to parse that decision. I am going to consider myself bound by Judge D'Mauro's ruling as the law of the case and, therefore, in that ground we are not going to allow any evidence.

The additional grounds that Mr. Ogden cites; namely, that under considerations of mens rea he should be allowed to show that Mr. Wurzberger had a belief that what he was doing was legal, The Court believes misperceives. It's not a specific intent crime. All the State needs to do is to show that there were -- it's to show -- it starts with this demonstration; namely, that there is a statute governing the sale and offering for sale a firework. That statute has certain elements. The Court is going to instruct the jury on those elements and The Court has given counsel it's [sic] proposed instructions. Those instructions include an absolutely standard instruction with respect to the general intent requirement having to do with knowledge and voluntarily, knowing and voluntary activities that are otherwise prescribed by law. That's all the -- that is the only intent or frame of mind hurdle that in The Court's view the State has to meet. And The Court is not going to allow Mr. Wurzberger to impose a specific additional defense based on his mistaken understanding that because Judge Grussing had ruled at the trial court level that this statute did not apply in one circumstance, that he was thereby insulated from any other prosecutions while the statute still remained on the books. That's an issue that's preserved, but it's not going to be an issue that we are going to inject into this jury trial today.

For those reasons, the State's motion in limine with respect to any mention of previous litigation regarding the display or sale of fireworks by Mr. Wurzberger and any lists of

fireworks that were part of that litigation is granted and such evidence is deemed irrelevant to the matter presently before The Court.

. . . .

MR. OGDEN: . . . . Will the State stipulate that the effect of The Court's denials and grants of the motions that you just went through is the same as if the defendant had attempted to raise the matter at trial and there had been an objection and the objection had been sustained.

THE COURT: If I understand what Mr. Ogden is doing, he's trying to spare us all from having to belabor this, once we get the jury in and send the jury back out so we can rule on this.

MR. MAXWELL: Yes. Oh, yes, the State has no problem. The State knows that on any of these issues may indeed be coming up at an appeal level or whatever. So, we have no problem with stipulating to that.

THE COURT: All right.

State v. Wurzberger, Vt. Dist. Ct. No. 70-1-95Wmcr (7 Dec 1995), Trial Tr. at 13-18, 19.

APPENDIX D

VT. SUPREME COURT
Filed in Clerk's Office
SEP 10 1997

ENTRY ORDER

SUPREME COURT DOCKET NOS. 96-178 & 96-179
SEPTEMBER TERM, 1996

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of
	}	Vermont, Unit No. 1
Carl L. Dann, et al	}	Windham Circuit
	}	
	}	DOCKET NO.
		70-1- 95Wmcr
		1572-12-94Wmcr

In the above-entitled case, the Clerk will enter:

Defendant's motion to reargue, filed August 21, 1997, fails to identify points of law or fact overlooked or misapprehended by this Court. The motion is therefore denied.

BY THE COURT:

Frederic W. Allen
Frederic W. Allen, Chief Justice

Ernest W. Gibson III
Ernest W. Gibson, III, Associate Justice

John A. Dooley
John A. Dooley, Associate Justice

James L. Morse
James L. Morse, Associate Justice

Denise R. Johnson
Denise R. Johnson, Associate Justice